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CASES CITED

STATUTES CITED

Supreme Court of the United States

OCTOBER TERM, 1947

No._____

POMPEY MARXHAUSEN FREDERICK, in his individual capacity and by John L. King, next friend,

PETITIONER

vs.

FIRST LIQUIDATING CORPORATION, a Michigan Corporation,
MERCHANTS APPAREL BUILDING, INC., a Michigan Corporation,
MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, a Foreign Corporation,
ROCHESTER APARTMENTS COMPANY, a Michigan Corporation,
LOUIS H. and GOLDIE SCHOSTAK, his wife, EVA WIDGODSKI and JEANNE H. GREENBAUM, jointly and severally,

DEFENDANTS

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Pompey Marxhausen Frederick in his individual capacity and by John L. King, next friend, by appointment of the Circuit Court of the County of Wayne and State of Michigan, respectfully shows:

SUMMARY STATEMENT OF THE CASE

Suit was instituted by summons issued by the Circuit Court of the County of Wayne and State of Michigan on April 6, 1946 (ii). In continuance of said suit or proceeding, a declaration, sounding in *ejectment* was filed on April 17, 1946 (R. 4-11). Personal service of summons was had upon all parties defendant on and before June 17, 1946 (R. iii).

Motions to dismiss said declaration on behalf of all defendants were filed June 10, 1946 (R. 14 to 29 inc.). Motion to STRIKE said motions to dismiss, R. 30 to 32, was filed on behalf of plaintiff relying upon the terms and provisions of Secs. 14907, 14908, 14909 and 14918 of Mich. C. L. 1929, and inasmuch as said Sec. 14909 is not quoted verbatim in said printed record, it is set forth here:

> "14909 Declaration; contents. Sec. 7. *It shall be sufficient* for the plaintiff to aver in his declaration, that on some day therein to be specified, and which shall be after his title or right accrued, he was possessed of the premises in question, describing them as hereinafter provided, and being so possessed thereof that the defendant afterwards, on some day to be stated, entered into such premises, and that he *unlawfully withholds* from the plaintiff the possession thereof, to his damage, any nominal sum the plaintiff shall think proper to state."

Argument was had upon said motions to dismiss and said motion to strike said motions to dismiss and on August 2, 1946, the trial court acting in the person of the Hon. Lila M. Neuenfelt, Wayne Circuit Judge, granted said motions to dismiss the declaration and amended declaration, with costs to defendants, R. 77-101.

Petitioner herein took appeal to the Supreme Court of the State of Michigan from said order and judgment of dismissal of said declaration and amendment thereto

filed. The reasons and grounds of said appeal are set forth at R. 105 to 118 and this court's particular attention is called to assignments of error, 1, 2, *8, 9 and 20*, R. 105, 109, 110 and 117, respectively.

Said Supreme Court of Michigan, being the court of last resort of the State of Michigan, *affirmed* the action of the Wayne Circuit court dismissing said declaration on motion of defendants (R.). Petitioner herein filed Petition for Rehearing of said Judgment and order of the Michigan Supreme Court and that court on May 16, 1947 denied said Petition for Rehearing without further opinion. Thereafter petitioner filed with said Supreme Court a motion for stay of proceedings until such time as petitioner had been accorded his statutory right to oral hearing and argument of said calendar cause and said Petition for Rehearing which said motion was denied by said Supreme Court on June 4, 1947 (R.).

OPINIONS BELOW

The opinion of the Wayne Circuit Court appears in the Record at pages 77 to 101. The opinion of the Supreme Court of the State of Michigan, that being the court of last resort in said State, appears at 27 N. W. (2d)—No. 1 at page 117. No opinion of that court was rendered on denial of Petition for Rehearing nor on denial of motion for stay of proceedings, said orders being entered under dates of May 16 and June 4, 1947.

JURISDICTION

The jurisdiction of this court over the subject-matter of this case arises by virtue of the provisions of the Act of February 13, 1925; Chap. 229, 43 Stat. 936; Sec. 237 (b) and that portion thereof which provides:

> "or where any *title, right, privilege* or immunity is specially set up or claimed by either party under the Constitution, treaties or laws of the United States . . ."

MANNER IN WHICH SUCH RIGHT, TITLE, PRIVILEGE OR IMMUNITY WAS RAISED IN STATE COURTS

Petitioner, *specifically* and expressly *declared upon* a *title in fee simple absolute* of specifically described real estate *devised* to him in the last will and testament of his maternal grandfather, August Marxhausen.

Petitioner likewise asserted his *right* and *privilege* of a *trial by jury* in accordance with the provisions of Chap. XXIX of the Michigan Judicature Act in said action of ejectment and as granted said petitioner under and by virtue of Art. VII of Amendments to the Constitution of the United States at the initial hearing of said motions to dismiss the declaration as shown by the statement of said trial judge in her opinion at R. 85, as follows:

> "Counsel for Plaintiff also claimed that his client was *entitled to jury trial* and that, therefore, a motion to dismiss in this action would not lie."

and the following appearing at R. 84.

> "The Plaintiff in his argument claimed that the action of ejectment was to of course test the title for real estate and that under the statute governing ejectment that a motion to dismiss did not lie and that the Defendants must proceed *to a trial on the merits,* upon notice being given to the plaintiff of special defenses in their answers."

and the following appearing at R. 88:

> "Upon Plaintiff's argument that the Plaintiff is *entitled to a jury trial,* I cite *Peoples Wayne County Bank vs. Wolverine Box Company,* 250 Mich. 273, 281. 'If there are not issues of fact to be determined, one is not entitled in a *civil* case to a *trial by jury*'."

The Petitioner further asserted a right, title, privilege or immunity under the Constitution of the United States in his "Reasons and Grounds of Appeal" (R. 105 to 118),

reference to which assignments of error is made for greater certainty, special reference being made to the following *specific assignments*:

R. 105. "1. The Court, without authority in law (statutory or otherwise) erroneously ***assumed*** and took unto itself ***jurisdiction to hear, try and determine,*** the many issues of mixed fact and law arising by virtue of plaintiff's declaration as amended, thereby depriving plaintiff-appellant of a trial by jury, contrary to the express provisions of Chap. XXIX of Mich. C. L. 1929 and contrary to the common law right to such ***trial by jury*** under the former *writ of right,* in all actions of ejectment.

R. 105. "2. The Court, erroneously and without authority in law, (statutory or otherwise) ***assumed*** unto itself, jurisdiction to hear, try and determine plaintiff's title to the premises described in the declaration which said *title* of plaintiff is a question of *fact for the jury* and not a question of law for the court under the express holding of this court. (See *DeMill v. Moffat* and *Same v. Thompson,* 45 Mich. 410-12.)

R. 109. "8. The court, by dismissing the plaintiff's declaration in ejectment, ***deprived*** plaintiff of his *property* in the premises declared upon ***without due process of law*** and in violation of the terms and provisions and guaranties set forth in Art. V of Amendments to the *Constitution of the United* States."

R. 110. "9. The judgment and order of dismissal, so entered by the court in the total absence of a trial by jury in this *common law* action of ejectment as in the former *writ of right,* deprived this plaintiff of his *Constitutional right* to *trial by jury* and review in accordance with the *rules of the common law* as guaranteed him by the terms and provisions of Art. VII of Amendments to the Constitution of the United States which reads as follows; (quotation omitted here).

R. 112. "12. . . . and the court omitted to find that the mortgage was licensed for the principal amount of $55,000.00 with 6% interest per annum, principal and interest being due in three years which said allegations of fact show on their face that *default* in the payment of said mortgage was *inevitable*, the entire income of the estate for said three year period amounting to only $36,000.00 and which facts, so appearing on the face of the petition and license to mortgage, would warrant *a jury* in finding that said license to mortgage for said sum and said term with power of sale upon default, *constituted a fraud* upon the owners of said real estate of which this minor plaintiff owned a 46-2/3% interest."

R. 116. "19. The judgment and order of dismissal was erroneous and without precedent in law and in violation of plaintiff's *rights* under Chap. XXIX of the Michigan Judicature Act as construed in the following cases; *Mich. Cent. RR. v. McNaughton*, 45 Mich. 87; *Church v. Holcomb*, 45 Mich. 29; *Detroit F. & M. Ins. Co. v. Aspinall*, 45 Mich. 29; *Demill v. Moffat*, 45 Mich. 410; *Matter of Godfrey Est.*, 4 Mich. 308; *Hoffman v. Beard*, 32 Mich. 218; *Ryder v. Flanders*, 30 Mich. 336; *Toll v. Wright*, 37 Mich. 93; and other cases including *Gantz v. Toles*, 40 Mich. 725.

R. 117. "20. The court erred in holding that the institution of this ejectment suit within one year after plaintiff reached maturity did not constitute a disaffirmance by said plaintiff of any contract made on behalf of said plaintiff during his infancy and which contract was not for the best interest of the plaintiff and erred in denying to plaintiff *the right* to a *trial by jury* on the theory of a valid disaffirmance of such contract or alleged contract, made during the infancy of plaintiff and erred in denying to plaintiff the *"equal protection of the law"* accorded like plaintiffs or parties in *Donovan v. Ward*, 100 Mich. 601; *Barr v. Packard Motor Car Co.*, 172 Mich. 299; *Reynolds v. Garber-Buick*, 183 Mich. 157;

Devries v. Crofoot, 148 Mich. 183; *Showers v. Robinson*, 43 Mich. 502 and *Russell v. Wheeler*, 129 Mich. 41 and cases cited therein.

R. 117. "21. The court erred in holding as a matter of law that the license to mortgage the premises in question was for a *purpose* within the authority of a probate judge to grant a license to mortgage such premises under the provisions of *Sec.* 15848 *Mich. C. L.* 1929 and in *refusing to leave* such question of such authority of such probate judge *to a jury* for determination in accordance with the *common law* and statutes relating to ejectment actions . . ."

R. 106. "5. Said judgment and order of dismissal of plaintiff's cause of action, taken and had by the Court in the total absence of any jury summoned to hear the evidence in such case, the same being taken and determined on motions to dismiss and not on evidence submitted to such jury, constituted a flagrant violation of the *Constitutional Right* of plaintiff-appellant to a trial by jury, guaranteed by Art. II, Sec. 13 of the Constitution of Michigan, 1908 and likewise deprived plaintiff of his property in the premises in question, without due process of law, contrary to the terms and provisions of Art. II, Sec. 16 of the Constitution of Michigan of 1908."

FEDERAL QUESTIONS RAISED ON PETITION FOR REHEARING

Pet'n for Rehearing, pg. 6.

"10. Said above rule of law is a rule of property in this State, as expressly ruled by the Supreme Court of the United States, in the *Bacon case, supra* (*Bacon v. Northwestern Life Ins. Co.*, 131 *U. S.* 258; 33 *L. Ed.* 128; 9 *S. Ct.* 787) . . and the judgment entered herein, affirming dismissal of the declaration and cause of action herein, *deprives* plaintiff and appellant of his property, *without due process* of law and likewise *denies* plaintiff and appellant of the *equal protection of the laws*, secured to him by the terms and provisions of Art. XIV of Amend-

ments to the Constitution of the United States, which reads, in part, as follows:

> "No State shall *make or enforce* any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of *life, liberty or property, without due process of law;* nor deny any person within its jurisdiction the *equal protection* of the laws."

"11. Said judgment of dismissal of the declaration and cause of action, not being based on any insufficiency of said declaration, but rather upon the *alleged lack of evidence* to support said declaration and cause of action, deprives plaintiff of his *day in court* and his *right*, as a citizen of the United States, to be heard upon the *merits* and to trial by jury or before the court as plaintiff may elect in this action of ejectment, the *right* to such trial by jury in such cases being an *absolute right* guaranteed by Magna Carta and further guaranteed by Arts. V and XIV of Amendments to the Constitution of the United States, and which *right* is an *absolute right and rule of property* in this State of Michigan ever since said State was admitted to the Union and even prior thereto as shown by Art II of the Articles of Compact for the Government of the Northwest Territory . . . , said Art. II reading as follows:

> "The inhabitants of said territory *shall always* be entitled to the benefits of the writ of habeas corpus, and of *trial by jury;* . . . and of judicial proceedings according to the course of the common law.
>
> " . . . No man shall be deprived of his *liberty or property,* but by the *judgment of his peers,* or *the law of the land.*"

and the rule of property and right to trial by jury being stated by this court and heretofore universally concurred in is perhaps most forcefully stated in

Hoffman vs. Beard, 22 Mich. 59, where at page 67, this Court in ruling against a Bill in Chancery for partition and dismissing the same, stated:

> "The substance of the principle is, that purely legal titles are to be tried at law, and parties are entitled to have them so tried where they can *have a jury trial as a matter of right.*"

In the interest of brevity petitioner herein incorporates by reference to the specific number and page of said Petition for Rehearing, filed with the Supreme Court of the State of Michigan, all further assignments of the Reasons and Grounds for the granting of a rehearing in said cause.

Assignment 13 at page 8 of Petition for Rehearing.

Assignment 17 at page 10 of said Petition.

Assignments 18 and 19 at pages 10-11 of above.

Assignment 20 at pages 11-12 thereof.

Assignment 21 at page 13.

Asignment 22 at pages 13, 14 and 15.

Assignment 22 at pages 13, 14 and 15.

Assignment 24 at page 16.

Assignment 25 at pages 16 and 17.

And assignment 27, Petition for Rehearing—18 was as follows:

> "27. The holding and judgment rendered in said case of *Burghard et al vs. Detroit Trust Co.,* 273 Mich. 629, constitutes a *prior adjudication* by this court that the lessee's interest in said leasehold premises was *paramount* to the lessor's interest therein at all times prior to *abandonment* of said premises and said leasehold by said lessee or its agents; thereby rendering null, void and of no legal effect, the said mortgage placed thereon by said William Roeglin, Executor of the mortgagors interest therein, inasmuch as no executor may be licensed to mortgage the *personal assets* of his decedent

testator; the ruling herein, by *reversing* said former judgment as to the character of said premises, whether real or personal, . . . denies this plaintiff the equal protection of the laws and deprives him of due process of the law contrary to the terms of said Amendment XIV to the Constitution of the United States."

RULINGS OF STATE COURT OF LAST RESORT OF A NATURE DENYING PETITIONER'S CLAIM OF A RIGHT, TITLE, PRIVILEGE OR IMMUNITY UNDER THE CONSTITUTION OF THE UNITED STATES

The State Supreme Court, in ruling on all the assignments of error contained in the Record on Appeal to said Court, stated in its opinion rendered in *Frederick vs. First Liquidating Corporation*, 27 N. W. (2d) No. 1 at pages 117, 118 as follows:

"Thereafter, by subsequent conveyances and a mortgage, the defendants herein *acquired title* to or lien on said premises.

"There were no disputed issues of fact to be determined in this case. The orders of the probate court are *res adjudicata* and the proceedings in said court stand as a bar of plaintiff's right in the property in question. The settlement agreement, approved by the probate court in the proceeding wherein plaintiff was a party by guardian, and by this court in *Re Marxhausen's Estate* (247 Mich. 192; 225 N. W. 632) also stands in the way of plaintiff's present claim of an interest in the property. The Circuit judge who heard the motions, discussed and correctly disposed of plaintiff's various claims of invalidity or irregularity in the probate proceedings and the mortgage foreclosure. *The various questions raised by appellant* in his brief have been *considered and found without merit.* None of them is controlling of the decision herein.

"The order dismissing the declaration is *affirmed*, with costs to defendants."

The order of said State Supreme Court denying Petition for Rehearing, dated May 16, 1947, constituted a denial of each and every assignment of a right, title, privilege or immunity under the Constitution of the United States set forth in said Petition.

TIMELINESS OF THIS PETITION

The final judgment of the Supreme Court of Michigan, that being the court of last resort in said State of Michigan was entered on May 16, 1947, said order and judgment denying a rehearing herein. This petition for certiorari is filed within three months from the date of the entry of such final judgment in said court.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth, Seventh and Fourteenth Amendments to the Constitution of the United States and Art. II of the Articles of Compact for the Government of the Northwest Territory and Arts. 39, 40, 45 and 52 of Magna Carta otherwise known as the Great Charter of Liberties are relied upon by petitioner as guaranteeing a right, title, privilege or immunity which was denied petitioner by said State Court of last resort.

QUESTIONS PRESENTED

(1) Does said judgment of dismissal of declaration in ejectment for the reasons stated in the opinion deny to petitioner the right to trial by jury as guaranteed by Art. VII of Amendments to the Constitution of the United States?

(2) Does said judgment of dismissal of said declaration in ejectment, which said declaration is admittedly "sufficient" under the provisions of Sec. 14909 Mich. C. L. 1929, deprive this petitioner of life, liberty of property without due process of law, contrary to the provisions of Art. V of Amendments to the Constitution of the United States?

(3) Does said judgment of dismissal abridge the privileges or immunities of citizens of the United States; deprive petitioner of life, liberty or property, without due process of law; or deny petitioner (a person within the jurisdiction of Michigan) the equal protection of the laws, contrary to the rights, privileges and immunities guaranteed by Art. XIV of Amendments to the Constitution of the United States?

(4) Does said judgment of dismissal deprive petitioner of his right to a 'day in court' and to proceedings 'according to the course of the common law' in that said judgment *reverses* the normal procedures under the common law and condemns petitioner before he has been heard on the merits and *adjudicates* the issues raised by the declaration without submission of said issues to a body possessing the only Constitutional power to adjudicate the issues raised by the declaration, to wit, a common law and impartial jury of peers, in violation of rights, privileges or immunities arising under Arts. V, VII or XIV of Amendments to the Constitution of the United States?

(5) Admitting that not every error committed by the State Court in the instant proceeding involves a Federal question under the decisions of this Court, does not the dismissal of the declaration in ejectment, which declaration was good and sufficient to hold defendants to trial at the common law as declared and codified by Sec. 14909 Mich. C. L. 1929, on the *pretext or pretense* that there was no factual merit to the cause of action declared upon, constitute a deprivation of the equal protection of the laws and a denial of the due process of the law, within the protection of said 14th Amendment?

(6) Does not the judgment rendered in the instant case constitute an adjudication of the *title* and *right to possession* of said premises, without first according the petitioner his *right* to be heard on the merits and before an *impartial*

jury of his peers on such questions of *title* in accordance with the *universal right* of such owners of real property since the *Great Charter of Liberties* and in denial of petitioners title, rights, privileges or immunities under Arts V, VII and XIV of Amendments to the Constitution of the U. S.?

(7) Does not the "due process and equal protection" clause of the 14th Amendment protect and preserve the right of a plaintiff in ejectment to trial on the merits and before a jury of all issues of fact and law arising out of the muniments of title declared upon in the instant proceeding and does not the dismissal of said cause of action, on the basis of a *final judgment* as to *title* against the plaintiff, deprive said plaintiff and this petitioner of said described real estate *without even the semblance,* much less the reality, of "due process of law" that being the equivalent of the "law of the land" as provided in Magna Carta as expressly ruled in *Davidson v. Bd. of Admin. of New Orleans,* 96 U. S. 97; 24 L. Ed. 616?

(8) Is not the defense of *res judicata* an affirmative defense and pleadable *only* in bar to the prosecution under the provisions of said Sec. 14918 Mich. C. L. 1929 in this action of ejectment and does not the judgment of dismissal on motion therefore, deprive petitioner of his common law right to object to the introduction in evidence of defendants muniments of title on the ground of the illegality of the proceedings taken and had in the acquisition of said muniments of title, in violation of the protection afforded by the 14th Amendment?

(9) Does anyone contend that the instant suit in ejectment involves the same identical subject-matter and the same parties as were involved in the orders, decrees and judgments of the Wayne Probate Court on petition to license the issuance of the mortgage in question herein and since that answer *must be* in the *negative,* is not the judg-

ment rendered herein so *fundamentally unsound and erroneous* and in *violation* of all *prior* rules of law on the subject of *res judicata*, as to constitute a denial of *due process of law* and *equal protection of the laws*, within the protection of said 14th Amendment?

(10) By *proclaiming* an entirely new and novel rule as to what constitutes *res judicata*, applicable to this case alone and in direct contrast to the decisions of said State Court of last resort in numerous cases in ejectment heretofore brought, did not that court, in legal effect and by mere *judicial pronouncement*, transfer property belonging to plaintiff to the defendants in open and flagrant violation of any Constitutional power in said Court, so to do, and in violation of the rule of law laid down in *Loan Association v. Topeka*, 20 Wall. 655, cited with approval in *C.B.&Q. Railway v. Chicago*, 166 U.S. 226;41 L. Ed. 979; 17 S. Ct. 581, wherein this court at page 237 of said U.S. report, stated;

> "Mr. Justice Miller, delivering the judgment of this court, after observing that there were *private rights* in every free government *beyond the control of the State*, and that a government, by whatever name it was called, under which the property of citizens was at the *absolute disposition* and *unlimited control* of any depository of power, was, after all, but a despotism, said: 'The theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative *and the judicial branches* of these governments *are all limited and defined* powers. . . .' No court, he said, would hesitate to *adjudge void* any statute declaring that the 'homestead now owned by A should no longer be his, but should henceforth be the property of "B'." (Italics supplied.)

11. The judgment entered herein, which goes further than a mere dismissal of plaintiff's declaration and actually attempts to adjudicate the title in dispute in the total

absence of any trial on the merits was entered on an opinion of the Supreme Court of Michigan, which while stating, "The various questions raised by appellant in his brief have been considered and found without merit. None of them is controlling of the decision herein."; *cautiously evaded* decision and adjudication of the rights accruing to said appellant and petitioner herein, growing out of a rule of property announced by the Michigan Supreme Court in three cases, now quoting from "Amendment to Brief of Appellant" filed with said State Supreme Court:

> "The rule of law relied on in support of the following objection to defendant's title is set forth in three Michigan cases, to-wit, *Matter of Godfrey Estate,* 4 Mich. 308; *Hoffman vs. Beard,* 32 Mich. 218; both of which cases were reviewed and reaffirmed in *Church vs. Holcomb,* 45 Mich. 29. Such rule of law is briefly stated in the latter case as follows:
>
> "Of the previous decisions, that in Matter of Godfrey Estate, merely holds that the court will not license the sale of lands to pay debts against an estate *after the legal remedy for their recovery has been barred by lapse of time.* (A rule which is fully applicable to the case at bar.) *Hoffman vs. Beard* holds that a license to sell issued to an administrator *after the estate has been actually closed, is wholly void,* and may be treated as void in collateral proceedings.
>
> "At. R. 36 appears the following calendar entry under date of Feb. 16, 1926, more than six months prior to filing of petition for license to mortgage.
>
> "Feb. 16, 1926 Exr. ordered render final account in ten days, etc.
>
> "Sept. 13 Exr. a/c filed and hearing Ord. Oct. 19."

(End of quotation from Brief in State Court.)

Does not said judgment, so *evading* any discussion of the rights accruing to petitioner under said above cases and adjudicating the instant proceeding in *direct opposition* to the *rule of property* therein announced, take petitioners property in said real estate and in his declaration and proceedings herein, without due process of law and in denial of the equal protection of the laws, prohibited all branches of the State government by virtue of Art. XIV of Amendments to the Constitution of the United States?

REASONS RELIED ON FOR ALLOWANCE OF WRIT

1. The State Court of last resort has denied a title, right, privilege, or immunity, specially set up or claimed by plaintiff-appellant in said State courts and being the petitioner herein.

2. Said title, right, privilege or immunity arises under and by virtue of the provisions of Arts. V, VII and XIV of Amendments to the Constitution of the United States and upon Art. II of the Articles of Compact for the Government of the Northwest Territory and upon Arts. 39, 40, 45 and 52 of Magna Carta, duly adopted and made a part of the Constitution of the United States by virtue of Arts. V, VII and XIV of Amendments.

3. The judgment of dismissal denied petitioner the right to be fully heard on the merits, before adjudication of the case on the merits in violation of Art. XIV of Amendments to the Constitution of the United States and in violation of the principle of law declared in *Central Land Company vs. Laidley,* 159 U. S. 103, 112; 16 S. Ct. 80; 40 L. Ed. 91.

4. Petitioner was deprived of a *fundamental* and *constitutional right* when his declaration in ejectment (amply sufficient at the common law and by statutes of Michigan

to hold defendants to trial on the merits and before a jury), was dismissed under the *pretext* that there were no issues of fact or of fact and law for the determination of a jury.

5. The jurisdiction of this court to re-examine the final judgment of the Supreme Court of Michigan and to reverse said judgment and remand the cause to the Circuit Court for the County of Wayne for proceedings in accordance with Chap. XXIX of the Michigan Judicature Act is amply *sustained* by the authority of *C.B.&Q. Railroad vs. Chicago,* 166 U. S. 226; 41 L. Ed. 979; 17 S. Ct. 581 and by *Fayerweather vs. Ritch,* 195 U. S. 276; 49 L. Ed. 193; 25 S. Ct. 78; *Abbott vs. Tacoma Bank of Commerce,* 175 U. S. 409; 44 L. Ed. 217; 20 S. Ct. 153; and cases therein cited.

6. The judgment of dismissal of plaintiff's declaration in ejectment on the ground of alleged prior adjudication of the matters in issue and arising by virtue of said declaration is *manifestly erroneous* or perhaps "manifestly absurd" in view of the fact that the legal issue arising by virtue of such declaration as defined by this court in *Bacon vs. Northwestern Life Ins. Co.,* 131 U. S. 258; 33 L. Ed. 128; 9 S. Ct. 787 is:

> "it is only necessary that the findings show possession by the defendants, and title and right of possession in the plaintiff"

whereas the Supreme Court of the State of Michigan affirmed a dismissal of such a declaration in ejectment on such ground of prior adjudication growing out of the issuance of a license to mortgage the premises in question given by the Probate Court of Wayne County to the executor of the last will and testament of August Marxhausen, Deceased, the said judgment of said Probate Court not amounting in law to *any adjudication whatsoever* of the title and right of plaintiff as against the possession of

said realty by the defendants, *said license to mortgage being issued in proceedings wherein this petitioner was not represented either by guardian or by guardian ad litem* nor was said guardian served with any notice of such proceedings to so license such mortgage and the petitioner has thereby been denied the equal protection of the laws and deprived of his property without due process of law by virtue of such arbitrary opinion and decision of the said Supreme Court of the State of Michigan.

7. The issues arising by virtue of petitioner's declaration were two in number, namely, (1) the legality or illegality of said license to mortgage said premises and (2) the legality or illegality of the statutory proceedings to foreclose said mortgage and even if it be admitted for the purposes of argument that the first issue is precluded under the rule of prior adjudication; the second issue, that of illegality of the foreclosure of said mortgage remains in issue and said alleged defense of prior adjudication cannot, as a matter of law, remotely affect the determination of such issue and the petitioner was thereby and by said judgment of dismissal, so contrary to all principles of the common law as to be classed as *arbitrary and capricious,* denied the equal protection of the laws and deprived of his property without due process of law contrary to said Amendment XIV.

8. The court of last resort in the State of Michigan *arbitrarily* and *capriciously ignored* the question as to the validity of said foreclosure proceedings by the *evasive* statements appearing in the opinion as follows:

> "It (the mortgage) went into default and in June, 1937, was foreclosed and the premises purchased by the First National Bank-Detroit at the foreclosure sale. . . . The circuit judge who heard the motions, discussed and correctly disposed of plaintiff's various claims of invalidity or irregularity in the probate proceedings and *the mortgage foreclosure.*"

and this petitioner was deprived of a valuable common law and Constitutional *right* to trial by jury of his peers in such action of ejectment and to proceedings in accordance with the common law, all by virtue of the *arbitrariness* of said judgment, and in violation of petitioner's rights under Arts. V, VII and XIV of Amendments to the Constitution of the United States.

9. The said judgment of dismissal of petitioner's declaration and cause of action, on grounds other than the *sufficiency* of said declaration constituted an *arbitrary exercise* of the powers of government unrestrained by the established principles of private right and distributive justice and operated *unequally* against petitioner (there being no precedent for such dismissal in any of the prior decisions of said State court) and said final judgment and action of said judiciary of said State was *absolutely* and *arbitrarily* inconsistent with the rights accorded petitioner under said Amendment XIV as held by this court in *C.B.&Q. Railroad v. Chicago, supra.*

10. In legal effect the Supreme Court of Michigan, without authority in law or statute, has 'taken the property devised to petitioner and vested said property in said defendants, without even the semblance of due process of law, even as condemned by this court in *Davidson v. New Orleans,* 96 U.S. 97 when attempted by the legislature, and contrary to *Missouri Pacific Railway v. Nebraska,* 164 U.S. 403, 417, both cited with approval in *C.B.&Q. Railway* case, supra.

11. The title declared upon is a title to real estate derived by mesne conveyances from the government of the United States and petitioner has been deprived of said title in the total absence of *proceedings in the course of the common law* and by an *authoritarian* opinion ignoring each and every earlier authority on the subject rendered by that same judicial tribunal, a tribunal which had on two prior

occasions adjudged causes against petitioner in 247 Mich. 192 and in 273 Mich. 629, in neither of which cases was petitioner accorded a trial by jury, and the legal effect thereof being that petitioner cannot be given a *fair and impartial trial* in said State of Michigan, *save by* the intervention of a *jury*, in accordance with his common-law right thereto as stated by the Michigan court in *Hoffman v. Beard*, 22 Mich. 59, where that Court stated;

> "The substance of the principle is, that purely legal titles are to be tried at law, and parties *are entitled* to have them so tried where they can *have a jury trial as matter of right.*"

and the legal effect of the holding of the Michigan court in the instant case is to set up a *fiction of fact*, in lieu of a verdict of a jury as authorized by statute and the common law since Magna Carta, depriving petitioner of the *semblance* of due process of law in the taking of his property, all as critically condemned by the Michigan Supreme Court in the prior case of *Dubois v. Campau*, 28 Mich. 304, at 335 where that court stated;

> "Fictions of law may sometime operate beneficially, but *fictions of fact* in the verdict of a jury (or in the opinions of the courts) ought not to be encouraged. *A sham so transparent, a subterfuge so palpable,* any where outside a court of law would be treated at best with ridicule and contempt, and it is not in the power of the courts to render it respectable." (Words within parentheses are the authors.)

12. The law of this cause is largely, if not completely settled by this Court in the case of *Whitehead v. Shattuck*, 138 U.S. 151; 34 L.Ed. 873; 11 S.Ct. 276 wherein Mr. Justice Feild, in affirming the dismissal of a bill in Chancery to quiet title to real property stated,

> "but this may be said, that, where an action is simply for the recovery and possession of specific

> real or personal property, . . ., the action is one at law. An *action for the recovery of real property*, including damages for withholding it, *has always been of that class*. The right which in this case the plaintiff wishes to assert is his title to certain real property; the remedy which he wishes to obtain is its possession and enjoyment; and *in a contest over the title both parties have a constitutional right to call for a jury.*"

13. The law of this cause is further controlled by the decision and judgment of this court rendered in an action entirely of a *civil* nature and not *quasi-criminal* as is this action of ejectment wherein the plea at common law is that of "guilty or not guilty," said judgment of this Court being rendered in *Slocum v. New York Life Ins. Co.*, 228 U.S. 364; 57 L.Ed. 879; 33 S. Ct. 523 wherein Mr. Justice Van Devanter, in speaking for the majority of the court, if not for the entire bench as to this phase of the law, stated at 386;

> "But, *without a waiver of the right* of trial by jury, by consent of parties, *the court errs if it substitutes itself for the jury*, and, passing upon the effect of the evidence, finds the facts involved in the issue and renders judgment thereon.
>
> This was what was done in the present case. It may be that the conclusions of fact reached and stated by the court are correct, and, when properly ascertained, that they require such a judgment as was rendered. That is a question not before us. The plaintiff in error complains that he was entitled to have the evidence submitted to the jury, and to the benefit of such conclusions of fact as it might justifiably have drawn; a right he demanded and did not waive; and that he has been deprived of it, by the act of the court, in entering a judgment against him on its own view of the evidence, without the intervention of a jury. *In this particular, we think error has been well assigned.*
>
> ". . . It is not a question of whether the facts

are difficult or easy of ascertainment, but of the *tribunal charged with their ascertainment*, and this, we have seen, consists of the *court and jury*, unless there be a waiver of the latter."

14. In this cause the State Court having before it a motion that was in nature a *demurrer to the declaration*, totally ignored the *nature of said pleading* and treated same as a *demurrer to the evidence* and without requiring said demurrant to set forth, "an express and distinct admission of *every fact* which the evidence of his adversary *conduces to prove*, else he cannot insist that the latter join in the demurrer; and the admission, to be effective to that end, must be *of the facts* and not merely the evidence from which their existence is inferable" as stated in the case of *Gibson v. Hunter*, 2 H. Bla. 187,205, as quoted in said *Slocum case, supra* at 388, and since the declaration distinctly avers that the defendants *unlawfully withhold possession* of said described premises from the plaintiff; in the present state of the pleadings, any demurrer to said evidence, sufficient to force plaintiff to join therein, must expressly and distinctly admit the allegations of said declaration with reference to ownership of said premises by plaintiff and an unlawful withholding of possession thereof by said defendants; the State Court *grievously erred* when it rendered judgment for defendants *as on demurrer to the evidence*, since an *essential feature* of any such demurrer to the evidence, is an *admission* of all the facts and conclusions from such facts which a *jury might justifiably infer*, including the basic fact or conclusion from the facts that plaintiff was the owner of the premises and defendants unlawfully withhold possession thereof from said plaintiff—; the legal effect of which is to set in motion the law as stated at 391 of the *Slocum case, supra*, where it is stated:

"At common law, if on demurrer to the evidence judgment was given for one party when it should

have been for the other, the *error was corrected in the appellate tribunal by directing the proper judgment,* and this because the error was confined to the judgment, and did not reach the facts as ascertained and shown in the demurrer."

15. Under said rule of law, *if facts have been admitted* forcing plaintiff to join in said *demurrer to the evidence,* a prerequisite to all such demurrers, the judgment being plainly in error, it follows that this Court should *direct a judgment in* favor of the plaintiff for the possession of the premises described in his declaration, that being the only judgment possible, *if defendants* have admitted the essentials of a demurrer to the evidence, or if they have *waived their right* to a trial by jury by proceeding on motions to dismiss such a declaration, contrary to express provisions of law, or if they *are in default* for having failed to plead to said declaration as required by Sec. 14918 Mich. C.L. 1929.

Wherefore, petitioner prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of Michigan, commanding that court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record of the proceedings in case No. 43,573, entitled on its docket "Frederick vs. First Liquidating Corp. et al." and that the judgment of said Supreme Court of the State of Michigan in said cause may be *reversed* by this Honorable Court, and that your petitioner may have such other and further relief in the premises as may be due him under the Constitution of the United States as amended by Arts. V, VII and XIV of Amendments, interpreted in the light of Art. II of the Articles of Compact for the *Government of the Northwest Territory* and Arts. 39 et seq of *Magna*

Carta and as to this Court may seem just and proper in the circumstances.

POMPEY MARXHAUSEN FREDERICK,
in his individual capacity, and

By

JOHN L. KING, next friend,
appointed in continuance of suit;

By

DON MAHONE HARLAN,
Attorney for Petitioner,
1810 Ford Building,
Detroit 26, Michigan.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 274

POMPEY MARXHAUSEN FREDERICK,
in his individual capacity and by John L. King, next friend,
Petitioner,
vs.
FIRST LIQUIDATING CORPORATION,
a Michigan Corporation,
MERCHANTS APPAREL BUILDING, INC.,
a Michigan Corporation,
MASSACHUETTS MUTUAL LIFE INSURANCE COMPANY, a Foreign Corporation,
ROCHESTER APARTMENTS COMPANY,
a Michigan Corporation,
LOUIS H. and GOLDIE SCHOSTAK, his wife,
EVA WIDGODSKI and JEANNE H. GREENBAUM,
jointly and severally,
Defendants

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

(Unless otherwise clearly shown by context, figures in parentheses refer to pages of the printed record)

A writ of certiorari, directed to the Michigan Supreme Court, is sought by the petitioner herein on the ground that he was denied a trial by jury in a state court ejectment suit (pp. 4, 12, 13 of petition). This claimed denial of jury trial resulted from an order of the circuit court for the County of Wayne (77-102), affirmed by the Su-

preme Court of the State of Michigan, granting defendants' motions to dismiss. The latter motions were predicated on former adjudications, and a settlement agreement to which petitioner through his former guardian was a party, as well as the failure of the plaintiff to allege a cause of action. Said motions were heard and granted pursuant to the provisions of Michigan Court rules authorizing such procedure where no material issue of fact is framed requiring a trial by jury.

The decision of the Michigan Supreme Court here complained of was filed on April 17, 1947 (appellant's petition for rehearing being denied on May 16, 1947), *Frederick v. First Liquidating Corporation*, 317 Mich. 637, 27 N. W. 2d 117. Respondents were served with copies of the printed petition for certiorari herein on August 8, 1947, and with notice of the filing thereof on August 21, 1947.

Examination of the record in this cause will readily disclose not only the absence of any basis for federal jurisdiction or review by this Court, but also the utter absence of any meritorious cause of action in the petitioner's ejectment proceedings in the state court. As the petition, however, does not set forth the facts of the case, we include herein the following statement of case.

STATEMENT OF CASE

Petitioner's suit in ejectment was based upon his claim to an undivided interest in real estate in the City of Detroit, Michigan, by virtue of a devise in the will of his grandfather, August Marxhausen. The latter died in 1920 ~~1924~~, and his estate was administered by the probate court for the County of Wayne. Petitioner Pompey Marxhausen Frederick, at that time a minor, was represented during the administration of said probate estate by his father, Christian Frederick, who was the duly appointed and qualified guardian of petitioner (24, 25).

In the course of the administration of the probate estate, it became necessary for the executor to borrow money for the payment of debts and expenses of administration. A petition for license to mortgage the real estate here in question was filed (49), duly published and noticed for hearing, and heard and granted by the probate court in December of 1926 (54, 55). The money was borrowed from the Dime Savings Bank of Detroit, a mortgage therefor being executed by the executor in accordance with the order of the Court, the report of the mortgage, together with statutory bond being duly filed with, and an order of confirmation being entered therein by, the Probate Court in January of 1927 (56-58).

Not only were the foregoing proceedings entirely regular, as pointed out by the Michigan Supreme Court, but the respective orders authorizing and confirming the mortgage as executed were never appealed from or set aside and have at all times remained in full force and effect (37).

Disputes arose between petitioner's guardian and other heirs of the estate, as well as with the executor, which

were resolved by an agreement of settlement, compromise and release entered into by the parties in interest in 1928 (59). The agreement was executed only after the parties, including petitioner through his said guardian, petitioned for and obtained authority from the Probate Court to enter into and consummate such settlement agreement (64, 66). In addition to the other issues settled thereby, said compromise agreement contained an express provision whereby the parties including petitioner, recognized the lien of the mortgage above referred to (59).

Upon consummation of said compromise the accounts of the executor were filed and allowed, the estate distributed, the executor discharged and the estate closed (38, 39, 68). Petitioner, through his guardian, received and retained his distributive share thereof (26, 27).

Thereafter, petitioner's guardian dismissed the counsel who had represented him up to that point, retained new counsel (consisting of present counsel for petitioner and an associate) and petitioned the probate court to set aside said compromise agreement and the subsequent proceedings taken on the strength thereof. This petition was heard by the probate judge and denied. The ruling was reviewed by petitioner's guardian by certiorari to the Circuit Court for the County of Wayne, whose ruling in turn was reviewed by writ of error sued out in the Supreme Court of Michigan. In both reviewing courts, the allegations made on behalf of petitioner were held without merit, and the rulings of the Probate Court were upheld (*In re Marxhausen's Estate,* 247 Mich. 192, 225 N. W. 632).

The mortgage in question eventually fell in default, and in 1937 was foreclosed (69). No redemption was had, and upon the foreclosure becoming absolute possession of the premises was obtained by the mortgagee (28). Present

defendants and respondents include subsequent innocent purchasers and mortgagee of the premises (28, 29).

In 1945, petitioner Pompey M. Frederick became of age (4), and in 1946, said suit in ejectment was instituted in his name by the same counsel who had unsuccessfully attacked the settlement agreement and proceedings as above described. Defendants moved to dismiss for the reasons already noted (14, 15, 19). After hearing and argument, and consideration of the briefs which were filed by all parties, the Court held the motions well founded and dismissed the suit. Upon appeal therefrom by the plaintiff, this ruling was sustained by the unanimous decision of the Michigan Supreme Court.

Because of the latter decisions, petitioner now seeks a writ of certiorari directed to the Michigan Supreme Court claiming unlawful deprival of the right to trial by jury.

ARGUMENT

A. STATE COURT RULES OF PRACTICE AND PROCEDURE, PERMITTING SUMMARY DISPOSITION OF CAUSES UPON MOTION WHERE NO ISSUE OF FACT EXISTS FOR DETERMINATION BY JURY, IN NO WAY INFRINGES UPON ANY CONSTITUTIONAL RIGHT TO TRIAL BY JURY.

B. NO FEDERAL QUESTION EXISTS, JUSTIFYING REVIEW OF THE DECISIONS OF THE STATE SUPREME COURT BY THIS COURT, BECAUSE OF DETERMINATION OF CIVIL ACTION UPON MOTION RATHER THAN BY JURY TRIAL UNDER STATE RULES OF PRACTICE AND PROCEDURE AUTHORIZING SUCH DISPOSITION IN ABSENCE OF ISSUE OF FACT REQUIRING JURY DETERMINATION.

Much of the practice and procedure in Michigan Courts is regulated by the court rules formulated by the Michigan Supreme Court. Rules 17 and 18 thereof, so far as material here provide as follows (Italics ours):

> "Rule 17.
>
> "Section 1. All pleadings must contain a plain and concise statement without repetition of the facts on which the pleader relies in stating his cause of action or defense, and no others. * * *
>
> "Sec. 7. Demurrers are abolished, and whenever any pleading at law or in equity is deemed to be insufficient in substance, a motion to dismiss or to strike or for judgment on the pleading may be made, * * *.
>
> "Rule 18.
>
> "Section 1. Defendant may, within the time for pleading, file a motion to dismiss the action or suit, where any of the following defects appear on the

face of the declaration or bill of complaint, and he may, within the same time, file a similar motion *supported by affidavits* where any of the said following defects do *not* appear upon the face of the declaration or bill of complaint:

• • •

"(e) That the cause of action is barred by a prior judgment.

• • •

"(g) That the claim or demand set forth in the plaintiff's pleading has been released. • • •

"Sec. 3. If, upon the hearing of such motion, the opposite party shall present affidavits or other proof denying the facts alleged or establishing facts obviating the objection, the court may take proof, and hear and determine the same and may grant or deny the motion; but if disputed questions of fact are involved the court may deny the motion without prejudice and *shall so deny it if the action is one at law and the opposite party demands that the issue be submitted to a jury.*"

As is plainly evident from the foregoing, full opportunity is granted by the court rule to create or define issues of fact, if any actually exist, and in that event the right to trial by jury is expressly reserved and protected.

This rule-making power of the Michigan Supreme Court is supported by both constitutional and legislative enactments. Thus, Article VII, section 5 of the Michigan Constitution of 1908 states:

"Sec. 5. The supreme court shall by general rules establish, modify and amend the practice in such court and in all other courts of record, and simplify the same. The legislature shall, as far as practicable, abolish distinctions between law and equity proceedings."

And Michigan Statutes Annotated, section 27.34, likewise provides:

> "(27.34) Same; rules of practice in courts of record, improvements. Sec. 14. The justices of the supreme court shall have power, and it shall be their duty, by general rules to establish, and from time to time thereafter to modify and amend, the practice in such court, and in all other courts of record, in the cases not provided for by any statute; and they shall, once at least in every two (2) years thereafter, if necessary, revise the said rules, with the view to the attainment, so far as may be practicable, of the following improvements in the practice:
>
> 1. The abolishing of distinctions between law and equity proceedings, as far as practicable;
>
> 2. The abolishing of all fictions and unnecessary process and proceedings;
>
> 3. The simplifying and abbreviating of the pleadings and proceedings;
>
> 4. The expediting of the decisions of causes;
>
> 5. The regulation of costs;
>
> 6. The remedying of such abuses and imperfections as may be found to exist in the practice;
>
> 7. The abolishing of all unnecessary forms and technicalities in pleading and practice;
>
> * * *"

In the present case all of the material facts were evidenced by incontrovertible (and uncontroverted) public records, consisting of recorded instruments and the judicial files and proceedings of courts of record. Pursuant to the court rules above cited, defendants moved to dismiss, their motions being supported by affidavits which incorporated the relevant records (17, 20, 21-29). Petitioner

denied none of the facts set forth by the defendants, and filed no affidavit in opposition to the motion as permitted by the court rule. Accordingly no issue of fact was presented (nor could one have been, in all honesty). The cause was submitted on briefs in which the various legal theories asserted by petitioner were argued.

An examination of the opinion of the Wayne circuit court will reveal the painstaking care and consideration which the circuit judge gave to the numerous (and frequently curious) legal theories advanced by the petitioner (77-101). The court concluded that the motions to dismiss were well founded, a conclusion which found unanimous affirmance in the Michigan Supreme Court.

Petitioner complains, in his petition to this Court, that he has been deprived of a jury trial, therefore has not had "his day in court," and consequently has been "deprived of property without due process of law." Quite obviously, however, a jury trial is not an end in and of itself, but merely a method provided by law for determining issues of fact where there are such relevant issues of fact requiring determination.

Just as a court may direct a verdict upon trial by jury, where the evidence is insufficient to go to a jury, it may also provide by rule for summary disposition of cases in which no material issue of fact exists. Certainly, there is no denial of due process, nor of a day in Court, in the setting up of judicial procedures for winnowing out and speedily disposing of cases which involve no issue of fact, or in which the cause of action or defense can be shown to be without merit as a matter of law.

> *Fidelity & Deposit Co. v. United States of America to the use of Smoot,* 187 U. S. 315, 47 L. ed. 194, at pages 197 and 198;

Robertson v. New York Life Insurance Co., 312 Mich. 92, 19 N. W. 2d 498; cert. den. 326 U. S. 786, 90 L. ed. 477, 66 Sup. Ct. 470; rehearing den. 327 U. S. 88, 66 Sup. Ct. 896;

Kaiser v. North, 292 Mich. 49, 289 N. W. 325;

Peoples Wayne County Bank v. Wolverine Box Co. 250 Mich. 273, 230 N. W. 170 (69 A. L. R. 1024).

As stated in the Kaiser case, *supra*, at page 55:

> "And the matter of appellants being deprived of a right to trial by jury is obviously of no consequence except it is first established that they have a cause of action to be tried. In *Peoples Wayne County Bank v. Wolverine Box Company*, 250 Mich. 273 (69 A. L. R. 1024), we said 'if there are not issues of fact to be determined, one is not entitled in a civil case to trial by jury. *In re: Peterson*, 253 U. S. 300 (40 Sup. Ct. 543).'"

Moreover, the propriety of trial by jury in such State Court civil proceedings involves no federal question, authorizing review by this Court of the decision of the Supreme Court of the State of Michigan. As this Court has had frequent occasion to point out, the Federal Constitution does not regulate state court judicial procedure or make obligatory a trial by jury therein. Among the many applicable decisions on this point are:

Walker v. Sauvinet, 92 U. S. 90, 23 L. ed. 678;

Southern R. Co. v. Durham, 266 U. S. 178, 69 L. ed. 231;

Chicago, R. I. & Pr. Co. v. Cole, 251 U. S. 54, 64 L. ed. 133, at pg. 135;

Minneapolis & St. L. R. Co. v. Bombolis, 241 U. S. 211, 217, 60 L. ed. 961, L. R. A. 1917A, 86.

As was said in the Walker case, *supra:*

"So far as we can discover from the record, the only federal question decided by either one of the courts below was that which related to the right of Walker to demand a trial by jury, notwithstanding the provisions of the Act of 1871 to the contrary. He insisted that he had a constitutional right to such a trial, and that the statute was void to the extent that it deprived him of this right.

"All questions arising under the Constitution of the State alone are finally settled by the judgment below. We can consider only such as grow out of the Constitution of the United States. By Article VII of the Amendments, it is provided, that 'In suits at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved.' This, as has been many times decided, relates only to trials in the courts of the United States. *Edwards v. Elliott,* 21 Wall. 557, 22 L. ed. 492. The States, so far as this Amendment is concerned, are left to regulate trials in their own courts in their own way. A trial by jury in suits at common law pending in the State Courts is not, therefore, a privilege or immunity of national citizenship, which the States are forbidden by the Fourteenth Amendment to abridge. A State cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the state courts affecting the property of persons must be by jury. This requirement of the Constitution is met, if the trial is had according to the settled course of judicial proceedings. *Murray v. Hoboken L. & I. Co.,* 18 How. 280, 15 L. ed. 376. Due process of law is process due according to the law of the land. This process in the States is regulated by the law of the State. Our power over that law is only to determine whether it is in conflict with the supreme law of the land; that is to say, with the Constitution and laws of the United States made in pursuance thereof, or with any treaty made under

> the authority of the United States. Art. VI Const. Here the State Court has decided that the proceeding below was in accordance with the law of the State; and we do not find that to be contrary to the Constitution, or any law or treaty of the United States."

As stated in the Southern Railway Company case, *supra:*

> "Neither Federal laws nor Constitution gave them the right to demand trial by jury when the local statutes and practice prescribed otherwise. The ordinary rule applies, and we accept the ruling of the supreme court as to the local law. *First Nat. Bank v. Weld County,* 264 U. S. 450, 454, 68 L. ed. 784, 787, 44 Sup. Ct. Rep. 385."

To like effect is the language of Mr. Justice Holmes in the Chicago etc. Railway Company case, *supra:*

> "There is nothing, however, in the Constitution of the United States or its Amendments, that requires a state to maintain the line with which we are familiar between the functions of the jury and those of the court. It may do away with the jury altogether (*Walker v. Sauvinet,* 92 U. S. 90, 23 L. ed. 678), modify its constitution (*Maxwell v. Dow,* 176 U. S. 581, 44 L. ed. 597, 20 Sup. Ct. Rep. 448, 494), the requirements of a verdict (*Minneapolis & St. L. R. Co. v. Bombolis,* 241 U. S. 211, 60 L. ed. 961, L. R. A. 1917A, 86, 36 Sup. Ct. Rep. 595, Ann. Cas. 1916E, 505), or the procedure before it (*Twining v. New Jersey,* 211 U. S. 78, 111, 53 L. ed. 97, 111, 29 Sup. Ct. Rep. 14; *Frank v. Mangum,* 237 U. S. 309, 340, 59 L. ed. 969, 985, 35 Sup. Ct. Rep. 582)."

The record below amply discloses that petitioner was given every opportunity to develop all theories of fact and of law occurring to him in support of his alleged cause of action. It is further quite apparent from the record,

however, that this cause is utterly devoid of any semblance of a meritorious cause of action. Every theory urged by petitioner below was heard and considered on its merits by the State circuit and supreme courts, and found by both courts to be without merit. Certainly, no basis whatever is shown or exists herein for review by this Court of the decision of the Michigan Supreme Court.

Respectfully submitted,

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